



Date: May 21, 1998

Case No. 97-INA-214

In the Matter of:

**EMPIRE STATE SUPPLIES**

Employer,

on behalf of:

**DIPNARINE RAMSINGH**

Alien.

Appearance: Darryl E. Greene, Esq.

Before: Huddleston, Lawson and Neusner  
Administrative Law Judges

JAMES W. LAWSON  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a) (5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.<sup>1</sup> After the Certifying Officer (CO) of the U.S. Department of Labor(DOL)denied the application, the Employer requested review pursuant to 20 CFR § 656.26.<sup>2</sup>

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

## **THE CO'S DECISION**

Employer seeks to fill the position of Parts Salvager with DOT Title Parts Salvager, DOT # 5251 638.281-026, a wage offer of \$12.69 per hour, job duties of:

Repairs salvable mechanical parts of valves and fittings. Dismantles pumps, valves, meters, using handtools, such as hacksaws, files, reamers, wrenches and screwdrivers. Inspects parts to determine salvageability or method of repairing or reworking parts. Sets up and operates metalworking tools, such as engine lathes, milling, drilling, grinding, polishing and buffing machines to repair parts. Files, taps, reams, bends and straightens, or uses other methods to recondition parts, using handtools. Reassemble parts, using handtools and power tools. Clean, store and issue reclaim parts. Also, arrange for sale of scrap. (AF 5)

and job requirements of two year's experience in the job offered. (AF 5)

The application was denied by the CO on the basis of employer's failure to adequately document good-faith efforts to recruit qualified U.S. workers and job-related reasons for their rejection..

## **ISSUES ON APPEAL**

On appeal, employer seeks review of the contentions, among others, that good-faith efforts were made to recruit U.S. workers. However, for the reasons stated in rebuttal, none were deemed suitable for the position. (AF 76)

## **DISCUSSION**

Employer has not shown grounds to reverse the FD of the CO.

The FD found that under the circumstances a good faith effort to recruit would have included letters to applicants Rozental, Shiwkumar, Duzant and Cortez offering an interview opportunity to clarify qualifications. The request for review does not dispute that such letters were not sent, but argues that telephone contacts were made and that an attempt will be now

made to document such contacts. However, the Notice of Findings directed that documentation be provided but the rebuttal failed to do so. It is now too late. Rebuttal evidence first submitted on appeal after issuance of the Final Determination along with the request for review is not part of the record and cannot be considered on appeal pursuant to 29 CFR 656.24(b)(4) and 656.27(c). *Memorial Granite* 94-INA-66 (Dec 23, 1994); *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); and *University of Texas at San Antonio*, 88-INA71 (May 5, 1988). Moreover it is noted that the FD correctly concluded with respect to the attorney's undocumented factual statements in the rebuttal:

Finally, the employer must note that an agent/attorney cannot be viewed as a competent witness regarding matters about which he does not have first hand knowledge, i.e. applicant recruitment, etc. That being the case, the employer is not viewed as having adequately responded to the N.O.F. (AF 71)

See *Modular Container Systems, Inc.* 89-INA-228 (July 16, 1991) (*en banc*)

Accordingly, the following order will enter.

## ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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JAMES W. LAWSON  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW  
Suite 400**

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Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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